IN THE

Supreme Court of the United States

Supreme Court, U. S.
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OCTOBER TERM 1978
NO. 78-18

UNITED STATES OF AMERICA,
Respondent,

v.

WILLIAM COURTNEY BATTS,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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OCTOBER TERM 1978
NO. ___

UNITED STATES OF AMERICA,
Respondent,

v.

WILLIAM COURTNEY BATTS,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

The petitioner, William Courtney Batts, respectfully prays that a writ of certiorari be issued to review the opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered on April 13, 1978, in United States of America, Plaintiff-Appellee v. William Courtney Batts, Defendant-Appellant, No. 76-2308.

I.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit filed on April 13, 1978, is printed in Appendix A, pp. A-1 through A-9 and is reported in 573 F.2d 599 (1978). A copy of the order amending the dissenting opinion is reprinted at Appendix A, pp. 10-12.

II.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 and Rule 22 of this Court.

The opinion of the Ninth Circuit Court of Appeals was entered on April 13, 1978. A timely petition for rehearing was filed, and petitioner suggested the appropriateness of a rehearing en banc. On June 5, 1978, an order was entered denying the petition for rehearing and rejecting the suggestion for a rehearing en banc. A copy of that order is printed in Appendix A at p. A-14.

III.

QUESTION PRESENTED FOR REVIEW

Whether evidence of defendant's participation in a cocaine sale obtained by an illegal search and seizure should be admitted to prove knowledge, motive or intent in a federal prosecution alleging a seven-month later importation of and possession of hashish with intent to distribute?

IV.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are Amendments IV and V to the United States Constitution. The statutes involved are those defining the crimes for which defendant was convicted, namely 18 U.S.C. § 2; 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B); and 21 U.S.C. §§ 952, 960(a)(1) and 960(b)(2). The rules involved are the Federal Rules of Evidence, Rules 404(b) and 608(b). Copies of the constitutional provisions, statutes, and rules are included in Appendix B, pp. B-1 through B-9.

V.

STATEMENT OF THE CASE

A. Procedural Background

1. Trial court

On October 8, 1975, the defendant was indicted in the United States District Court, Western District of Washington at Seattle, and charged with two criminal counts arising out of the same event. Count I alleged a September 30, 1975, importation of marijuana in the form of hashish in violation of Title 21 U.S.C. §§ 952, 960(a)(1) and 960(b)(2) and Title 18 U.S.C. § 2. Count II alleged possession of the same substance with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and Title 18 U.S.C. § 2 (R. 3, 4).

Defendant was found guilty of both counts by a jury on April 29, 1976 (R. 11). Defendant's post-trial motions were denied, and a judgment and commitment was entered on May 28, 1976 (R. 31, 33). Defendant was sentenced concurrently on

each count under the Federal Youth Correction Act, 18 U.S.C. §§ 5005-5024 (R. 33).

A notice of appeal was timely filed by the defendant on June 3, 1976 (R. 34).

2. Appellate court

The original opinion in this case was filed on June 3, 1977. A copy of that opinion is included in Appendix A at pp. A-15 through A-26. This opinion was amended by two orders entered on August 2, 1977. These two orders are printed in Apendix A at pp. A-36 through A-40.

On August 9, 1977, an order was entered withdrawing the first opinion as amended and directing consideration of the appeal en banc. A copy of that order is included in Appendix A at pp. A-41 through A-42. Oral argument was held before the court of appeals en banc on October 12, 1977.

On January 20, 1978, the court entered an order determining that the case was inappropriate for en banc consideration and ordered its return to the original panel. That order is reprinted in Appendix A at p. A-43. The new opinion printed

at Appendix A-1 through A-9 was then filed on April 13, 1978.

B. Basis For Federal Jurisdiction in the Trial Court

The United States district court had jurisdiction in the first instance under 18 U.S.C. § 3231 because the indictment alleged a federal crime.

C. Factual Material Relevant To Petition

Petitioner Batts, hereafter referred to as "defendant", and a third party arrived at the port of entry into the United States near Lynden, Washington in the third party's truck. A search of the port of entry disclosed 15 one kilo bricks of hashish concealed in a panel of the truck (T. 4-15). There was a dispute over whether the defendant or the third party was driving the vehicle at the time of entry into the United States (T. 5-21, 67, 68, 117). Both the defendant and the third person were taken into custody at the border.

Defendant was wearing a silver trinket around his neck at the time he was taken into custody.

One of the customs officers testified that defendant told him that the trinket was a coke spoon (T. 47). The coke spoon, Exhibit 10, was admitted into evidence without objection.

Defendant testified at trial and denied any knowledge that hashish was hidden in the truck (T. 119). No questions were asked the defendant on direct examination about the trinket found around his neck.

The defendant was asked the following questions during the government's cross-examination:

Q. You are being handed number 10, the spoon; what is that, Mr. Batts?
A. That's a necklace that was given to me by my girlfriend.
Q. And what is it supposed to be?
A. Well, I used it for cleaning the dirt out from under my fingernails. I don't know what they use it for.
Q. You don't know what it is?
A. Well, I had an idea when they were asking me, "well, don't you use this for sniffing coke?" and I said, "No, I do not."
Q. Is what you are saying is that you didn't know before they said anything that that is commonly known as a coke spoon?
A. No, I did not.
Q. You had no knowledge about that?
A. No, sir.

Q. No knowledge about cocaine use, are you saying no?
A. No.

(T. 135).

Over appellant's objection (R. 149-160), the government was permitted on rebuttal to introduce evidence showing that the defendant had seven months earlier negotiated the sale of cocaine to an undercover local law enforcement agent. None of the persons involved in this cocaine transaction were involved in the hashish matter which formed the basis of this federal prosecution. The cocaine sale did not result in a conviction because the cocaine was suppressed because of an admittedly-illegal search and seizure (T. 157-160).

The evidence of the cocaine transaction was the testimony of an undercover agent (T. 169-178). During that testimony, the witness was handed three clear plastic bags of white power marked as Plaintiff's Exhibit 14 and a glass vial with a small amount of white powder marked as Plaintiff's Exhibit 15 (T. 177). The witness had previously testified that he had obtained this powder through

the defendant. The witness testified that the powder was subjected to laboratory analysis and identified as cocaine (T. 177, 178). The vial marked as Exhibit 15 was withdrawn at the request of the government. There is some question as to whether the three plastic bags of cocaine, Exhibit 14, were withdrawn (T. 177, 178).

D. Reasons For Granting the Writ

1. The decision of the court below has decided the question presented in a manner in conflict with the applicable decisions of this court

The government in the case at bar used the fruits of an illegal search to convict the defendant. The government was allowed to testify about and exhibit to the jury the very cocaine obtained as a result of that illegal search. Finally, the government was allowed to place into evidence the results of the laboratory examination of the illegally-obtained cocaine. This Court has consistently held that illegally-obtained evidence and the fruits from it must be suppressed and not used

against the defendant. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S. Ct. 182, 64 L. Ed. 319 (1920); Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); United States v. Jeffers, 342 U.S. 48, 96 L. Ed. 59, 72 S. Ct. 93 (1951).

This Court has recently decided that some statements obtained in violation of the Miranda ruling can be used for impeachment purposes. Oregon v. Hass, 420 U.S. 714, 95 S. Ct. 1215, 43 L. Ed. 2d 570 (1975) and Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L. Ed. 2d 182 (1974). These cases do not control the question presented here. Miranda involves the Fifth Amendment; and this case involves an unlawful search and seizure. In Hass and Tucker the evidence was used to impeach a defendant. In the case at bar, the evidence was admitted as substantive proof of the crime charged through showing knowledge, motive and intent.[1]

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[1] The original opinion in this cause held the evidence was admissible to attack defendant's credibility. This opinion was withdrawn, as it should have been. Federal Rules of Evidence, Rule 608(b) prohibit the use of extrinsic evidence of alleged criminal activity (other than a conviction) to attack credibility. The circuits are uniform in consistently ruling out such evidence under Rule 608(b). United States v. Brown, 547 F.2d 438, 445 (8th Cir. 1977), United States v. Edwards, 549 F.2d 362, 367-68 (5th Cir. 1977); United States v. DeVincent, 546 F.2d 452, 456 (1st Cir. 1976); United States v. Wright, 542 F.2d 975, 980 (7th Cir. 1976); United States v. Estell, 539 F.2d 697, 700 (10th Cir. 1976); United States v. Blackshire, 538 F.2d 569, 572 (4th Cir. 1976).

The court of appeals decision would have been in conflict with decisions from this Court even if the illegally-seized evidence had been used for impeachment purposes. This Court has held that illegally-seized evidence may be introduced to impeach a defendant's direct testimony if the defendant makes a broad, sweeping denial that he has never in his life sold or possessed narcotics. Walder v. United States, 347 U.S. 62, 74 S. Ct. 354, 98 L. Ed. 503 (1954). However, illegally-obtained evidence is not admissible to impeach answers obtained by the government in its own cross-examination. To hold otherwise would permit the government to smuggle in the fruits of the illegally-obtained evidence when the defendant never put the matter in issue. Agnello v. United

States, 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145 (1925) and United States v. Trejo, 501 F.2d 138 (9th Cir. 1974). See also Federal Rules of Evidence, Rule 608(b), which excludes extrinsic evidence of misconduct to attack credibility under all circumstances. See footnote 1.

The decision of the Court of Appeals for the Ninth Circuit permits the introduction of illegally-obtained evidence to prove substantive elements of a crime. This is a dangerous precedent which will, if unchecked by this Court, erode significant and substantial constitutional protections previously available to all Americans.

2. The decision of the court of appeals has decided a question with respect to the Federal Rules of Evidence in a manner that has so far departed from the usual and accepted course of judicial proceeding as to call for an exercise of this court's supervision

The court of appeals held that evidence of the defendant's participation in the sale of one ounce of cocaine was admissible under Federal Rules of Evidence, Rule 404(b) to show knowledge, motive

and intent in a federal prosecution charging defendant with importing marijuana (hashish) seven months later into the United States for the purpose of distributing it. Rule 404(b) is a rule of exclusion. It states that evidence of other crimes or criminal acts is not admissible to prove character and that a person acted in conformity with that character. The last sentence of the rule simply makes it clear that the rule deals only with proof of character:

> [Evidence of other criminal acts] may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The analysis of the court of appeals misses the point. Rule 404(b) does not make any knowledge, motive, or intent admissible. The knowledge, motive, or intent must relate directly to the crime charged. Here, the defendant simply denied knowledge of the concealed hashish. The fact that the defendant may have at one time engaged in a cocaine sale is not even circumstantial evidence that defendant knew hashish was in the pick-up truck on the day in question some seven months

later. United States v. Jones, 438 F.2d 461 (7th Cir. 1971), and Enriquez v. United States, 314 F.2d 703 (9th Cir. 1963). To make the evidence relevant, the jury would have to believe that the evidence showed that the defendant's character was such that he would sell drugs. Therefore, seven month later he would act in conformity with his character and import a different drug for the purposes of selling it. This is exactly what Rule 404(b) says is improper. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The court of appeals improperly interpreted the second sentence of 404(b) to open the trial to a flood gate of otherwise inadmissible evidence.

VI.

CONCLUSION

Petitioner respectfully submits that this Court should grant his petition for writ of certiorari.

Respectfully submitted,

MURRAY B. GUTERSON

Attorney for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
April 13, 1978
EMIL E. MELFI, JR.
CLERK,
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM COURTNEY BATTS,
Defendant-Appellant.

NO. 76-2308

OPINION

Appeal from the United States District Court
for the Western District of Washington

Before: KENNEDY and ANDERSON, Circuit Judges, and VAN PELT,* District Judge.

ANDERSON, Circuit Judge:

This appeal has been referred back to the panel by the court sitting en banc as having been taken en banc improvidently. The panel opinion of June 3, 1977, as amended August 2, 1977, is hereby withdrawn and the following opinion is substituted.

Batts and one Michael Heiges were charged in a two-count indictment with the importation of hashish in violation of 21 U.S.C. §§ 952, 960(a)(1) and 960(b)(2) and 18 U.S.C. § 2. Mr. Heiges, not wishing to test the fact-finding process, fled the jurisdiction and is still at large. Batts was tried by a jury and was convicted on both counts. Batts appeals and we affirm.

The sole issue presented for review is whether it was error to allow the government to

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* Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

introduce, in its rebuttal case, evidence of prior criminal activity of the appellant.

The facts taken in the light most favorable to the government reveal that Batts and Heiges arrived in Heiges' El Camino truck at the port of entry near Lynden, Washington. A subsequent search at the port of entry disclosed 15 bricks of hashish hidden in the wall of the truckbed. The concealed compartment in the wall of the truckbed was covered by a metal plate secured by phillips head screws. A set of tools which contained numerous phillips head screwdrivers was also found in the truck.

A detailed account of what occurred at trial is necessary to understand how the issue unfolded. Immigration Inspector Bunch, the initial inspection officer on the scene, was the first witness to testify. He testified that after asking the routine preliminary questions, he inspected the interior of the El Camino and found marijuana seeds. He then directed the truck to the secondary search area. He testified that the two occupants were "overly nervous and overly helpful." (R.T. 9) He then testified as to the occurrences surrounding the search and eventual discovery of the hashish. He also testified that he had discovered the set of tools in the bed of the El Camino.

The next person to testify was Customs Inspector Barnes. He testified that since he owned an El Camino and was familiar with its construction, he assisted Officer Bunch in his search of the vehicle. He testified as to his discovery of the hashish in the concealed compartment in the wall of the truckbed. He testified that appellant had told him that the set of tools found belonged to appellant. He testified that he had personally searched appellant and found a silver trinket around appellant's neck. He testified that appellant told him it was a coke spoon.[1] At this time, Exhibit 10, the coke spoon, was admitted without objection. He testified further as to

comments by appellant regarding the "luckiness" of the search[2] and to appellant's requests for photos of the hashish.[3]

The next witness pertinent to our discussion was DEA Agent McClary. He testified that during his interview of appellant, appellant told him he was the driver of the vehicle. He also testified that Mr. Heiges did not have a valid driver's license. DEA Agent Brant was next to testify and he testified as to the chain of custody of the coke spoon and how the coke spoon was used. All of this testimony was adduced without objection. Upon the conclusion of his testimony, the government rested.

The first witness to testify for the defense was the appellant. He testified as to his personal history and background, including his family situation, education, and employment record. He identified the box of tools and testified that they were his, and that he did not permit anyone to use his tools unless he was personally present. He testified as to his acquaintanceship with Mr. Heiges and the reasons why he accompanied him on the trip to Canada. He described the sojourn into Canada and denied that he was driving the El Camino when it arrived at the port of entry. He also testified that he asked Inspector Barnes if the discovery of the hashish was just lucky,[4] and that he had requested photos of the seizure.[5] Appellant also denied any knowledge that the hashish was hidden in the car.[6]

During cross-examination, and without objection, the following colloquy took place:

"Q. You are being handed No. 10, the spoon; what is that, Mr. Batts?
A. That's a necklace that was given to me by my girlfriend.
Q. And what is it supposed to be?

A. Well, I used it for cleaning the dirt out from under my fingernails. I don't know what they use it for.
Q. You don't know what it is?
A. Well, I had an idea when they were asking me, 'Well, don't you use this for sniffing coke?' and I said, 'No, I do not.'
Q. Is what you are saying is that you didn't know before they said anything that that is commonly known as a coke spoon?
A. No, I did not.
Q. You had no knowledge about that?
A. No, sir.
Q. No knowledge about cocaine use, are you saying no?
A. No." (R.T. 135)

Appellant then called as a witness his girlfriend who testified that she had received the coke spoon from a friend and had given it as a gift to the appellant. This friend also testified and corroborated the girlfriend's testimony.

On rebuttal, over appellant's objection, the government introduced evidence showing that appellant had offered and negotiated the sale of a large amount of cocaine to an undercover agent seven months previous to the incident in question. The eventual sale of cocaine did not result in a conviction as the cocaine was suppressed because of an admittedly illegal search and seizure, specifically a violation of the state's no-knock rules.[7] The trial court firmly instructed the jury that such evidence was admissible only to impeach appellant's credibility and to show knowledge and intent.

We believe that this evidence was admissible under Rule 404(b), Federal Rules of Evidence, which allows evidence of such acts to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. See also United States v. Marshall, 526 F.2d 1349, 1360-61 (9th Cir.), cert. denied, 426 U.S. 923 (1976). The comments of counsel and the trial court clearly demonstrate that such evidence was directed at appellant's claimed lack of knowledge.[8]

In deciding whether to admit this evidence under Rule 404(b), the trial court also had to make the determination as to whether the danger of undue prejudice outweighed the probative value of the evidence as required under Rule 403, Federal Rules of Evidence. Our review of the record convinces us that the trial court properly struck the balance in favor of admitting the evidence.

In this case the rebuttal evidence consisted of prior activity in drugs, albeit a different drug. The connecting factor between the crime charged here and the rebuttal evidence is the fact that the crime here charges an intent to distribute (hashish) and the rebuttal evidence discloses acts of negotiation leading up to an act of distribution. Merely because the drugs involved are different does not strip this conduct of its evidentiary value. The past acts of negotiation leading to the distribution of one drug is relevant to show knowledge, motive and intent on the part of appellant to partake in the attempt here to import commercial quantities of yet another drug for the purposes of distribution. The relevant factor is the type of activity undertaken, not the identity of the drugs. United States v. Perez, 491 F.2d 167 (9th Cir.), cert. denied, 419 U.S. 858 (1974); United States v. Rivera, 437 F.2d 879 (7th Cir. 1971). In light of appellant's claimed lack of knowledge of cocaine, the uses of the coke spoon and the existence of the hashish in the El Camino, we believe that the probative value of this evidence showing appellant's true

knowledge and involvement in drug activities clearly outweighs any prejudicial effect.

It must also be remembered that the admissibility of rebuttal evidence is subject to the sound discretion of the trial court. United States v. Perez, supra. Great deference must be accorded to this discretion and the judgment of the trial court. He was present and able to observe appellant's manner and demeanor on the stand. Our review of the cold record discloses to us that the general tenor of appellant's testimony was a portrayal of one completely naive about drugs. The trial judge was in the best position to evaluate the effect this mis-painted picture had on the jury. By admitting the rebuttal evidence, the trial court merely permitted completion of the picture as to appellant's true involvement and knowledge in the drug world and thereby corrected a distorted view of appellant's testimony and his attempts to portray naivety.

AFFIRMED.

FOOTNOTES

1 "Q. And what did you do or say at that time?
A. (Mr. Barnes) I said that it looks like a coke spoon. He (appellant) said it was." (R.T. 47)

2 "A. (Mr. Barnes) . . . and he asked me was it just lucky that I found the drugs where I did, and I told him that not necessarily lucky, that we do look especially on certain cars that have compartments similar to that of the El Camino." (R.T. 49)

3 "A. (Mr. Barnes) . . . and he started taking pictures of the drugs, and Mr. Batts asked if that was a newspaper man or a photographer from the newspaper, and I told him it wasn't because that was a Customs officer, and I told the port director that I would like to have some pictures of the seizure myself, and if any of them came out, Mr. Batts said he would like to have some of the pictures."

4 "Q. Did you also make some inquiry as to whether they had some information that they were going to find some drugs or whether it was just dumb luck or something like that?
A. Well, I asked him what the deal was because like we were almost ready to go through, and I was just about ready to get back in the car when they found it and started checking back there, and I didn't know what was going on, I didn't even know what they had found until the DEA agent told me." R.T. 118-119)

5 "Q. And at the time did you make any inquiry of the man who made the pictures or anybody else in his presence?
A. Yes, I asked him if I could have a photograph because no one would believe me if I told them what happened." (R.T. 118).

6 Q. "All right. Now with respect to the incident at the border and the government agents finding this hashish in the '66 El Camino, did you know that that quantity or any quantity of drugs was inside the panel of that particular truck?
A. No, I did not." (R. T. 119).

7 In this case we are not confronted with the issue addressed in United States v. Trejo, 501 F.2d 138 (9th Cir. 1974), which dealt with the applicability of the exclusionary rule where illegally-seized evidence was offered to impeach (by contradiction) the defendant after he had denied, on cross-examination, owning the items that were illegally seized. The rebuttal evidence in this case was not illegally seized. The rebuttal evidence consisted solely of testimony about the offer and negotiations between appellant and the undercover agent which occurred prior to the no-knock violation. As such, this evidence is not tainted by the subsequent illegal search and seizure which resulted in the suppression of the cocaine. Had the illegally-seized cocaine been admitted, United States v. Trejo, supra, would apply unless enactment of the Federal Rules of Evidence lessens its validity. However, this issue has not been raised here and we express no opinion. However, in this case the suppressed cocaine was offered but was immediately

withdrawn; therefore there was no illegally-seized evidence admitted in this case. Additionally, we do not think that the jury's viewing of the two cocaine exhibits, which were labeled and identified by the undercover agent while he was on the stand, was prejudicial. As stated, the exhibits were withdrawn immediately and never admitted into evidence and the admissible testimony of the agent clearly focused on the fact that the subject of the negotiations involved cocaine. The mere viewing of these exhibits did not inform the jury of something new; they knew it was a cocaine transaction and this fact was never denied; the error, if any, was harmless.

8 The prosecutor stated:

"MR. MAIR: Again in light of Mr. Batts' flat denial of any knowledge of cocaine, I would introduce - - seek to introduce testimony of officers who would testify that Mr. Batts offered and negotiated a cocaine sale with them before this event." (R.T. 149).

The trial court's eventual response was:

"THE COURT: . . . Frankly, I was going to rule with Mr. Guterson on this until the testimony of Mr. Batts. He stated that he didn't know - - had no knowledge about cocaine use, no knowledge about the use of this spoon. He also testified, and this response kind of slipped by, he testified that he really didn't know what this was, and I'm speaking of the spoon, speaking of the hash, until later, and he found out what this substance was." (R.T. 151-52).

RE: UNITED STATES v. WILLIAM COURTNEY BATTS
No. 76-2308

KENNEDY, Circuit Judge, Dissenting:

The principal issue of the case in its present posture concerns application of the rule in Trejo v. United States, 501 F.2d 138 (9th Cir. 1974), to evidence of the defendant's prior criminal acts. I agree with the majority's statement of the rule, but disagree with the manner in which the majority applies it to the facts here. The question is whether or not illegally-seized evidence was considered by the jury. Since I believe that the jury did consider such matters, I respectfully dissent.

After the close of the defendant's case, the Government offered a single rebuttal witness, detective Stokke, who testified that on an earlier occasion he had seized three bags of cocaine from the defendant. The majority concedes that "[h]ad the illegally-seized cocaine been admitted, United States v. Trejo, supra, would apply . . .," but decides that the cocaine exhibits were withdrawn and that the rebuttal evidence "consisted solely of the offer and negotiations between appellant and the undercover agent which had occurred prior to [the illegal seizure]." (majority opinion at n.7 supra). I find no support in the record for that determination.

The concluding and somewhat dramatic testimony on which the Government rested its case is best understood by direct quotation, and is set forth in the margin.[1] It is immediately apparent that the laboratory analysis of the bags' contents was critical evidence. The scientific identification of the contents as cocaine was of primary relevance to the detective's testimony, quite apart from the exhibition of the bags themselves. The testimony as to the laboratory analysis was never withdrawn; the jury was not instructed to disregard it; and the

prosecution rested immediately when that testimony was given, no doubt to underscore its importance. I fail to understand how the majority can construe this testimony as anything other than a direct reliance upon evidence that resulted from an unlawful seizure.

Although it is thus incorrect for the majority to draw any comfort from its determination that the exhibit consisting of the three bags of cocaine was withdrawn, that determination is also unsupported by the record. The prosecutor stated: "I move the admissibility of 14. I withdraw that." The word "that" is ambiguous, but two lines later the reporter interpreted the reference to pertain to exhibit 15, which was a glass vial containing cocaine, not the three bags. This interpretation by the court reporter is repeated in the index to the transcript, which shows that exhibit 14 (the three bags) remained in evidence and that only exhibit 15 (the glass vial) was withdrawn.

I therefore cannot agree that integration of the illegally-seized evidence into this trail was somehow cured by the subsequent withdrawal of the exhibit. I conclude that it was error to permit the jury to consider either the evidence that pertained to the contents of the bags or the tangible evidence consisting of the bags themselves. The argument of the majority that evidence of possession of the cocaine is merely cumulative to the testimony of the detective is unconvincing. Possession of cocaine is far more material to the issue in this case than would be uncorroborated testimony concerning an offer to sell. Since I cannot conclude that either error was harmless beyond a reasonable doubt, Chapman v. California, 386 U.S. 18, 23 (1967); Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963), I would reverse the conviction.

/s/
United States Circuit Judge

FOOTNOTES

1

Q. [Prosecutor] All right. What happened then?
A. [Stokke] Then the surveilling officers entered the house and we effected the arrest on the individuals.
. . . .
Q. Did you seize the white powder?
A. Yes, I did.
Q. And Plaintiff's Exhibit 14, what is in that package?
A. Three clear plastic bags of white powder.
Q. And are those the ones you transacted on?
A. Yes.
Q. Plaintiff's Exhibit 15 is what?
A. This is one glass vial with a small amount of white powder in it.
Q. And was that a part of that negotiation?
A. No, it was not.
[Prosecutor]: Your Honor, we strike 15.
THE COURT: All right. It will be stricken.
Q. [Prosecutor] Now, was that white powder submitted to laboratory analysis?
A. It was.
Q. And did it remain in your custody until it was --
A. Yes, it was.
Q. All right. And what was the white powder?
A. The white powder was analyzed as cocaine.

(R.T. at 176-78).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
APR 20 1978
EMIL E. MELFI, JR.
CLERK,
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff-Appellee,	
v.	No. 76-2308
WILLIAM COURTNEY BATTS, Defendant-Appellant.	ORDER

Appeal from the United States District Court for the Western District of Washington

Before: KENNEDY and ANDERSON, Circuit Judges, and VAN PELT,* District Judge.

The dissenting opinion heretofore filed is amended in the following respects:

A signal for footnote 1 should be inserted at page 1, line 22 as follows: "(majority opinion at n.7 supra).[1]" The text of new footnote 1 is as follows:

> The majority suggests that enactment of the Federal Rules of Evidence may have undermined the rule in Trejo. My objections to that reasoning are fully set forth in a dissent from an opinion of the panel which was later withdrawn. United States v. Batts, 558 F.2d 513, 519 (9th Cir. 1977). The text of that dissent is here incorporated by reference.

At page 1, line 26, the signal for footnote 1 should now be for footnote 2, and the text of that footnote retained.

*Honorable Robert Van Pelt, Senior United States District Judge for the District of Nebraska, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 5 1978
EMIL E. MELFI, JR.
CLERK,
U.S.COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM COURTNEY BATTS,
Defendant-Appellant.

No. 76-2308

ORDER

Before: KENNEDY and ANDERSON, Circuit Judges, and VAN PELT,* District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*The Honorable Robert Van Pelt, Senior United States District Judge for the District of Nebraska, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JUN 3 1977
EMIL E. MELFI, JR.
CLERK,
U.S.COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM COURTNEY BATTS,
Defendant-Appellant.

No. 76-2308

OPINION

Appeal from the United States District Court for the Western District of Washington

Before: KENNEDY and ANDERSON, Circuit Judges, and VAN PELT,* District Judge.

ANDERSON, Circuit Judge:

Batts and one Michael Heiges were charged in a two-count indictment with the importation of hashish in violation of 21 U.S.C. §§ 952, 960(a)(1) and 960(b)(2) and 18 U.S.C. § 2 and for possession of hashish with intent to distribute in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B) and 18 U.S.C. § 2. Mr. Heiges, not wishing to test the fact-finding process, fled the jurisdiction and is still at large. Batts was tried by a jury and was convicted on both counts. Batts appeals and we affirm.

The sole issue presented for review is whether it was error to allow the government to introduce, in its rebuttal case, evidence of prior criminal activity of the appellant.

*Honorable Robert Van Pelt, Senior United States District Judge, District of Nebraska, sitting by designation.

The facts taken in the light most favorable to the government reveal that Batts and Heiges arrived in Heiges' El Camino truck at the port of entry near Lynden, Washington. A subsequent search at the port of entry disclosed 15 bricks of hashish hidden in the wall of the truckbed. The concealed compartment in the wall of the truckbed was covered by a metal plate secured by phillips head screws. A set of tools which contained numerous phillips head screwdrivers was also found in the truck.

A detailed account of what occurred at trial is necessary to understand how the issue unfolded. Immigration Inspector Bunch, the initial inspection officer on the scene, was the first witness to testify. He testified that after asking the routine preliminary questions, he inspected the interior of the El Camino and found marijuana seeds. He then directed the truck to the secondary search area. He testified that the two occupants were "overly nervous and overly helpful." (R.T. 9). He then testified as to the occurrences surrounding the search and eventual discovery of the hashish. He also testified that he had discovered the set of tools in the bed of the El Camino.

The next person to testify was Customs Inspector Barnes. He testified that since he owned an El Camino and was familiar with its construction, he assisted Officer Bunch in his search of the vehicle. He testified as to his discovery of the hashish in the concealed compartment in the wall of the truckbed. He testified that appellant had told him that the set of tools found was appellant's. He testified that he had personally searched appellant and found a silver trinket around appellant's neck. He testified that appellant told him that it was a coke spoon.[1] At this time, Exhibit 10, the coke spoon, was admitted without objection. He testified further as to comments by appellant regarding the "luckiness" of the search[2] and to appellant's requests for photos of the hashish.[3]

The next witness pertinent to our discussion was DEA Agent McClary. He testified that during his interview of appellant, appellant told him he was the driver of the vehicle. He also testified that Mr. Heiges did not have a valid driver's license and that appellant did have a valid driver's license. DEA Agent Brant was next to testify and he testified as to the chain of custody of the coke spoon and how the coke spoon was used. All of this testimony was adduced without objection. Upon the conclusion of his testimony, the government rested.

The first witness to testify for the defense was the appellant. He testified as to his personal history and background, including his family situation, education, and employment record. He identified the box of tools and testified that they were his, and that he did not permit anyone to use his tools unless he was personally present. He testified as to his acquaintanceship with Mr. Heiges and the reasons why he accompanied him on the trip to Canada. He described the sojourn into Canada and denied that he was driving the El Camino when it arrived at the port of entry. He also testified that he asked Inspector Barnes if the discovery of the hashish was just lucky[4], and that he had requested photos of the seizure.[5] Appellant also denied any knowledge that the hashish was hidden in the car.

During cross-examination, and without objection, the following colloquy took place:

"Q. You are being handed No. 10, the spoon; what is that, Mr. Batts?
A. That's a necklace that was given to me by my girlfriend.
Q. And what is it supposed to be?
A. Well, I used it for cleaning the dirt out from under my fingernails. I don't know what they use it for.

Q. You don't know what it is?
A. Well, I had an idea when they were asking me, 'Well, don't you use this for sniffing coke?' and I said, 'No, I do not.'
Q. Is what you are saying is that you didn't know before they said anything that that is commonly known as a coke spoon?
A. No, I did not.
Q. You had no knowledge about that?
A. No, sir.
Q. No knowledge about cocaine use, are you saying no?
A. No." (R.T. 135).

Appellant then called as a witness his girlfriend, who testified that she had received the coke spoon from a friend and had given it as a gift to the appellant. This friend also testified and corroborated the girlfriend's testimony.

On rebuttal, over appellant's objection, the government introduced evidence showing that appellant had sold a large amount of cocaine to an undercover agent seven months previous to the incident in question. This sale did not result in a conviction as the cocaine was suppressed because of an admittedly illegal search and seizure. The trial court firmly and correctly instructed the jury that such evidence was admissible only to impeach appellant's credibility and to show knowledge and intent.

As we base our affirmance on the proper exercise of the trial court's discretion, we must attempt to view this matter from the perspective of the trial court as the issue unfolded before it. It must first be recognized that testimony about the coke spoon and the coke spoon itself had already been received in evidence without objection before appellant took the stand. On cross-examination, appellant testified that he had no knowledge of cocaine or the uses for the coke spoon. This

line of inquiry was not objected to by appellant's counsel. At this point, only the trial court, sua sponte, could have ordered the testimony stricken. Such a procedure by the trial court would have been questionable since, as noted, evidence relating to the coke spoon had already been received in evidence and it was at least arguable that appellant had opened up the subject area by testifying to other contemporaneous events at the port of entry.[6]

Had the trial court been faced with an objection, it was still within the court's power to admit the testimony. Rule 611(b), Federal Rules of Evidence, states, in pertinent part: "The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination." In light of the factors mentioned above, it would not appear to have been an abuse of discretion to allow this testimony. As there was no objection, the trial court was not faced with this issue.

On the basis of this testimony properly received by the trial court, the prosecutor stated:

> "MR. MAIR: Again in light of Mr. Batts' flat denial of any knowledge of cocaine, I would introduce - - seek to introduce testimony of officers who would testify that Mr. Batts offered and negotiated a cocaine sale with them before this event." (R.T. 149)

The trial court was then squarely faced with the issue of whether to submit the case to the jury in its present false light or to allow the rebuttal evidence to put the jury on notice of all relevant factors necessary to perform its function of ascertaining the truth. More specifically, the trial court was faced with a confrontation of the "no extrinsic evidence rule" contained in Rule 608(b)[7] and the general purpose of the rules of evidence as stated in Rule 102.[8]

We believe that the ultimate purpose of the rules of evidence should not be lost by a rigid, blind application of a single rule of evidence. Individual rules of evidence, in this instance Rule 608(b), should not be read in isolation, when to do so destroys the purpose of ascertaining the truth. This is especially so when a witness directly contradicts the relevant evidence which Rule 608(b) seeks to exclude.

This view is supported by Judge Weinstein, who, in speaking directly to Rule 608(b), stated:

> "Rule 608 expresses the Advisory Committee's feeling that since the issue of credibility is often central, depriving the jury of relevant information about witnesses is unwarranted and unduly interferes with the law's basic emphasis on truth-finding. It recognizes, however, that a mechanical test of admission may be incapable of achieving justice in a particular case. Rule 608(b) should accordingly be interpreted in a manner consonant with the basic aims of the rules of evidence: to strike a balance between the needs of the judicial system and the needs of the individual witness as determined by the unique circumstances of the case in which he is appearing."
> 3 Weinstein's Evidence, § 608, at 608-24.

Judge Weinstein also sets forth Senator McClellan's position on the need for full cross-examination in conjunction with 608(b) as expressed in the Senator's letter of August 12, 1971, as follows:

> "Of . . concern to me is the apparent shift away from the sort of full and effective cross-examination envisioned by the Supreme Court in Michelson v. United States, 335 U.S. 469 (1949) by the substitution of the phrases 'clearly probative. . . and not remote in time' in Subdivision (b), in the March 1971 version for the term 'relevant' in the March 1969 draft. Granted that abuse is possible, I would trust to the common sense, fairness and discretion of the trial judge under a general concept of 'relevancy' before introducing unnecessary second guessing on an appeal on issues such as 'clearness' and 'remoteness.' I urge, therefore, a return to the original language of the March 1969 draft; the present draft bespeaks too much of a lack of trust in trial judges." 3 Weinstein's Evidence, § 608 at 608-16, n. 8.

While the original language was not readopted in the final version of the rules, the word "clearly" was omitted which we feel provides greater flexibility and discretion for the trial judge.

The comments of the trial judge appear to indicate, although not specifically stated, that he was undertaking the balancing test as advocated by Judge Weinstein. The trial court stated:

> THE COURT: . . . Frankly, I was going to rule with Mr. Guterson on this until the testimony of Mr. Batts. He stated that he didn't know -- had no knowledge about cocaine use, no knowledge about the use of this spoon. He also testified, and this response kind of slipped by, he testified that he really didn't know what this was, and I'm speaking of the spoon, speaking of the hash, until later, and he found out what this substance was." (R.T. 151-52).

The admittance of rebuttal evidence is subject to the sound discretion of the trial court. United States v. Perez, 491 F.2d 167 (9th Cir.), cert. denied, 419 U.S. 858 (1974). Great deference must be accorded to this discretion and the judgment of the trial court. He was present and able

to observe appellant's manner and demeanor on the stand. Our review of the "cold record" discloses to us that the general tenor of appellant's direct testimony was a portrayal of one completely naive about drugs. The trial judge was in the best position to evaluate the effect this mis-painted picture had on the jury. By admitting the rebuttal evidence, the trial court merely completed the picture as to appellant's true involvement and knowledge in the drug world and thereby corrected a distorted view of appellant's testimony.

We must also note that the trial court was aided in applying the above-mentioned balancing test by the fact that the rebuttal evidence consisted of prior activity in drugs, albeit a different drug. The connecting factor between the crime charged here and the rebuttal evidence is the fact that the crime here charges an intent to distribute (hashish) and rebuttal evidence discloses an act of distribution. Merely because the drugs involved are different does not strip this conduct of its evidentiary value. The past act of distribution of one drug is relevant to show knowledge, motive and intent on the part of appellant to partake in the attempt here to import commercial quantities of yet another drug for the purposes of distribution. The relevant factor is the type of activity undertaken, not the identity of the drugs. United States v. Perez, supra; United States v. Rivera, 437 F.2d 879 (7th Cir. 1971). When such probative value is coupled with, as in the present case, a claimed lack of knowledge about drugs, the rule of evidence which would exclude such conduct should be carefully scrutinized and weighed in light of the ultimate purpose of ascertaining the truth. We believe the trial court properly exercised its discretion in not applying in isolation a rule of evidence which would destroy this goal.

We must emphasize that our holding today is based solely on the facts of the present case and

the trial judge's discretionary powers in response to those facts. This decision should not be read as creating a new rule of evidence or a new approach to the Rules of Evidence. This decision merely reflects that when a rigid application of a rule of evidence would obstruct and defeat the central purpose of the rules as a whole, a balancing test of the peculiarities and relevant factors of the individual case should be undertaken. Under the facts of this case, the trial court correctly found that the balance was in favor of its ruling admitting the rebuttal evidence.[9]

AFFIRMED.

FOOTNOTES

1 "Q. And what did you do or say at that time?
A. (Mr. Barnes) I said that it looks like a coke spoon. He (appellant) said it was." (R.T. 47).

2 "A. (Mr. Barnes). . . and he asked me was it just lucky that I found the drugs where I did, and I told him that not necessarily lucky, that we do look especially on certain cars that have compartments similar to that of the El Camino." (R.T. 49).

3 "A. (Mr. Barnes). . .and he started taking pictures of the drugs, and Mr. Batts asked if that was a newspaper man or a photographer from the newspaper, and I told him it wasn't because that was a Customs officer, and I told the port director that I would like to have some pictures of the seizure myself, and if any of them came out, Mr. Batts said he would like to have some of the pictures."

4 "Q. Did you also make some inquiry as to whether they had some information that they were going to find some drugs or whether it was just dumb luck or something like that?
A. Well, I asked him what the deal was because like we were almost ready to go through, and I was just about ready to get back in the car when they found it and started checking back there, and I didn't know what was going on, I didn't even know what they had found until the DEA agent told me." (R.T. 118-119).

5 "Q. And at that time did you make any inquiry of the man who made the pictures or anybody else in his presence?
A. Yes, I asked him if I could have a photograph because no one would believe me if I told them what happened."
(R.T. 118).

6 In Banning v. United States, 130 F.2d 330 (6th Cir. 1942), cert. denied, 317 U.S. 695 (1943), the court stated:
"It frequently happens that on direct examination of a witness as to a conversation, transaction or other matter, counsel will bring out only such parts as are favorable to the party he represents. When this occurs, it is the right of the cross-examiner to put the trial court in possession of the full details respecting the matters within the scope of the direct examination."
130 F.2d at 338.

See also WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 416, p. 197; 81 Am. Jur. 2d, Witnesses § 481, p. 489, 490.

7 Rule 608(b), Fed. Rules Evid., states in pertinent part:
."(b) SPECIFIC INSTANCES OF CONDUCT. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence."

8 Rule 102, Fed. Rules Evid. states:
"These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."

9

We are mindful of United States v. Trejo, 501 F.2d 138 (9th Cir. 1974). We question the wisdom of the finding of error in that case, but note that, even though the trial court ruling was held to be error, it was not prejudicial error and the conviction was affirmed. It is the result of a rigid application of a single rule of evidence or prior case law and appears to overlook the importance of the truth-finding process. Moreover, we believe the rationale of our holding under the facts in this case is more appropriate to the circumstances and is more consistent with the aim and central purpose of the Federal Rules of Evidence.

UNITED STATES v. WILLIAM COURTNEY BATTS
No. 76-2308

KENNEDY, Circuit Judge, dissenting:

The majority opinion all but concedes that its holding contradicts the law of this circuit which mandates that the exclusionary rule apply where illegally-seized evidence is proferred to show prior bad acts. The opinion also contravenes express provisions of the Federal Rules of Evidence. The majority justifies its departure from these authorities either by attempted factual distinctions that are wholly unpersuasive or by arguments that have been expressly rejected by the draftsmen of the Federal Rules of Evidence. For these reasons, I respectfully dissent.

The majority must agree that Batts did not open the subject of his previous drug use. He briefly testified about his residence, education, and background, as will any defendant who takes the stand. Of necessity he then related the events at the customs station on the day of his arrest. The prosecution knew that Batts had been arrested on cocaine charges seven months before the incident at bar. On cross-examination the prosecution sought to find an opening by which it might introduce into evidence the defendant's prior bad acts. It took great pains to question Batts about the cocaine spoon he was wearing when he was arrested. The prosecution's obvious purpose in asking the defendant about the cocaine spoon was to invite Batts to deny any knowledge of cocaine, so that the damaging evidence of his earlier cocaine dealings might be brought to the jury's attention. By using this tactic, the prosecution introduced extrinsic evidence in rebuttal. The Government called an undercover agent who testified at length concerning his purchase of cocaine from Batts. It also introduced three clear plastic bags of cocaine that had been seized in violation of the fourth amendment at the time of Batts' arrest following the cocaine sale.

In United States v. Trejo, 501 F.2d 138 (9th Cir. 1974), this court considered the applicability of the exclusionary rule where illegally seized evidence is offered to show prior criminal conduct. In Trejo, after examining the relevant decisions of the Supreme Court on the issue, we held that the controlling distinction in deciding whether illegally seized evidence may be admitted for impeachment purposes is whether the subject of prior criminal conduct is opened by the defendant in his direct testimony or instead by the prosecution on cross-examination. We held that illegally-seized evidence may not be admitted where the prosecution opens the line of inquiry. As stated in Trejo: "[S]ince the offered evidence does not focus on the truthfulness of [the] defendant's direct testimony, we hold its introduction into evidence to be error." 501 F.2d at 145.

The Trejo rule controls the instant case. The illegally seized evidence introduced in rebuttal did not focus on the truthfulness of Batts' direct testimony. As in Trejo, the defendant's protestations of innocence during his direct examination were limited to a general denial of the crime for which he was charged. The defense carefully avoided raising on direct the issue of Batts' previous experience with drugs. The relevance of the illegally-seized evidence for impeachment purposes is confined to the answers Batts gave to questions put to him by the prosecution on cross-examination. Since Batts did not testify on the subject of his prior conduct during his direct examination (or voluntarily raise it on cross-examination), it was error to allow the illegally seized cocaine into evidence.[1]

The majority's treatment of United States v. Trejo, supra, is unconvincing. The court's opinion seems to say that Trejo is wrong and appears to conclude that the Federal Rules of Evidence supersede it. I fail to see how the Federal Rules of Evidence may take precedence over an exclusionary rule of constitutional dimensions. But even

assuming that the Federal Rules alone are controlling, they required the trial court to exclude the extrinsic evidence of Batts' prior cocaine dealings, since that evidence was offered to impeach credibility.

Fed. R. Evid. 608(b) explicitly provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." The rule codifies conventional practice which has evolved since the early eighteenth century. See 3A Wigmore, Evidence § 979 (Chadbourn rev. 1970); E. Morgan, Basic Problems of Evidence 73 (1962); Hale, "Specific Acts and Related Matters as Affecting Credibility," 1 Hastings L.J. 89 (1950). Rule 608(b) has been applied unequivocally by this and other circuits.[2]

The majority holds that the trial judge properly exercised its discretion in admitting the rebuttal evidence so the case would not go to the jury under a "false light." What the court ignores is that the Federal Rules specifically provide only two exceptions to the "no extrinsic evidence" rule, neither of which permit extrinsic evidence of prior bad acts to impeach in these circumstances. Specific instances of conduct to support or impeach credibility are first provable when they have been the subject of criminal conviction, as provided in rule 609. Second, specific instances may be inquired into on cross-examination of the witness himself, in the discretion of the court, "if probative of truthfulness or untruthfulness. . . (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness of another witness as to which character the witness being cross-examined has testified." Fed. R. Evid. 608(b).

The legislative history of rules 608(b) and 609 indicates that Congress considered the balance

between the importance of ascertaining the truth and the dangers of undue prejudice and that it designed these provisions carefully to provide these two exceptions to the rule, but no others.[3] The discretion of trial judges to admit evidence of specific instances of conduct to impeach or support credibility was intended to be confined to these exceptions.

The legislative history of rule 608(b) cited in the majority opinion does not support the majority's conclusions. Considerable discussion in formulating the rules centered around the scope of cross-examination as to specific instances of conduct. It is instructive to note that while there were differences of opinion as to how broad the discretion of the trial court should be in permitting such cross-examination,[4] all of the participants in the debate took for granted that a cross-examiner must accept the answers he receives about specific instances relating to credibility and that he could not introduce extrinsic evidence of those matters.[5] This general understanding of rule 608(b) was succinctly expressed by Professor Cleary, the reporter of the Advisory Committee on Federal Rules of Evidence, in a statement to the House of Representatives during its hearing on the rules. Professor Cleary reported:

> If relevant to truthfulness and not remote in time, inquiry may be made upon cross-examination as to incidents bearing upon the credibility of a witness, but they may not be proved by extrinsic evidence. The cross-examiner is bound by the answer.

(Emphasis added). Federal Rules of Evidence: Hearings on H.R. 5463 Before the Special Subcommittee on Reform of Federal Criminal Laws of the Committee on the Judiciary, House of Representatives, 93d Cong., 2d Sess. 96 (1973), reprinted in 20 U.S. Sup. Ct. Digest 239, 256 (1975).

In support of its interpretation of rule 608(b) the majority quotes from a letter by Senator McClellan to the Committee on Rules of Practice and Procedure and from Judge Weinstein's treatise on evidence. 3 Weinstein's Evidence ¶¶ 608[02] at 608-16, 608[05] at 608-24 (1975). The majority misperceives the type of discretion being discussed in those explanations. Both Senator McClellan's letter and the passage quoted from the treatise address the factors that the trial court is allowed to and should consider in the exercise of its statutory discretion to allow inquiry about specific instances of conduct during cross-examination of the witness himself. This is hardly support for the proposition that the court has discretion to override the limitations of rule 608(b) by an ad hoc and vaguely defined exception.

While the notes of the Advisory Committee on the Federal Rules make clear that some of the rules are ones of general import that can be applied with considerable flexibility, see, e.g., Notes to Federal Rules of Evidence 404(b), 611, the Committee's comments indicate that there is no discretion to ignore the specific language of the first sentence of rule 608(b). The comments identify no exception to the general rule except as stated in the rule itself. And Judge Weinstein notes that: "Rule 608(b) is intended to be restrictive--and was amended to ensure that it would be restrictively interpreted by trial courts . . . . "3 Weinstein, supra, ¶ 608[5], at 608-28.[6]

Finally, even assuming that some exception could be made to rule 608(b), the court's appeal to the general principles of rule 102 has no merit. Where the prosection declined to use the very device provided by the rule to allow some inquiry into prior conduct for impeachment purposes -- the right to cross-examine Batts about his prior drug dealings -- there is no justification for a court-created exception to rule 608(b). The prosecution

chose not to press Batts about his denial of any knowledge about cocaine. Instead it waited until the end of the trial. Then the Government introduced a police detective who narrated the prior cocaine arrest in great detail, and in conclusion it introduced three plastic bags of cocaine. The effect of this on the jury was obviously overwhelming.

Thus, even if the majority's interpretation of the interplay of rule 608(b) and 102 were correct, I still could not agree that we should distort the rule where the prosecution manifestly failed to use it properly. The court's opinion gratuitously sanctions questionable prosecutorial tactics that flaunt the rules and that create the serious possibility of "unfair prejudice, confusion of the issues, [and] misleading the jury . . . ." Fed. R. Evid. 403. See Notes of Advisory Committee on Proposed Rules, Fed. R. Evid. 608(b).

For these reasons, I would reverse the conviction.

/s/
United States Circuit Judge

FOOTNOTES

1 The factual setting of the issues before us is strikingly similar to that in Agnello v. United States, 269 U.S. 20 (1925), on which our decision in United States v. Trejo is predicated. In Agnello the defendant had been tried for drug-related offenses. At the time of his arrest, he was carrying packages containing cocaine on his person. On direct examination Agnello testified he did not know the packages contained cocaine and that he would not have been carrying them had he known of their contents. On cross-examination, the defendant stated he had never seen narcotics. The Supreme Court ruled that the trial court committed reversible error in allowing the prosecution to introduce into evidence a can of cocaine illegally seized from Agnello's house, Agnello v. United States, 269 U.S. at 35.

2 United States v. Wood, 550 F.2d 435, 441 (9th Cir. 1976); United States v. Edwards, 549 F.2d 362, 367-68 (5th Cir. 1977); United States v. Cluck, 544 F.2d 195 (5th Cir. 1976); United States v. Estell, 539 F.2d 697 (10th Cir. 1976).

3 For an extensive and careful discussion of the legislative background of rule 609, see United States v. Smith, No. 75-1920 (D.C. Cir. Dec. 17, 1976) and references therein.

4 As originally drafted in 1969, the rule allowed a trial court the discretion to permit cross-examination if the incidents were "relevant to truthfulness or untruthfulness." These were objections that the rule as drafted was too broad and presented serious potential for abuse. See, e.g., Objections of Professor Brook to the Advisory Committee on proposed rule 608, quoted in 3 Weinstein's Evidence

¶ 608[02] at 608-13. The words "relevant to" were stricken from the rule and were replaced in the March 1971 draft by the words "clearly probative of." There was controversy over these changes also. The Committee on Trial Practice and Technique of the Second Circuit believed the allowable scope of cross-examination under the rule was too broad. The Department of Justice and Senator McClellan, on the other hand, were of the opinion that the rule was too restrictive. 3 Weinstein, supra, ¶ 608[02] at 608-14.

5

Commenting on the March 1971 draft, the Department of Justice, which advocated a broad rule, noted:

> By limiting the scope of cross-examination the proposed Rule would provide too free an opportunity to parade false or biased character witnesses. The substantial possibility of abuse under the accepted test of cross-examination, which the comment to the Revised Draft conjections, is less significant than there assumed. . . . The possibility of abuse is best guarded against by the now common practice of trial judges requiring cross-examiners to give their professional assurance that they have reasonable grounds to believe that such specific instances of misconduct have occurred; by the rule that inquiry concerning specific instances of misconduct made in bad faith may be the basis for reversal of a conviction; and by the inherent limitation of the common law That [sic] "[i]f the witness denies the alleged misconduct, the examiner 'must take his answer,' not in the sense that he may not further cross-examine to extort an admission but in the sense that he may not call other witnesses to prove the discrediting acts."

(emphasis added and citations omitted). Report 42-43 (1971), reprinted in part in 3 Weinstein's Evidence ¶ 608[02] at 608-15.

6

In its attempt to distinguish Trejo, the majority intimates that the rule announced in that case is the product of rigid principles that have been replaced by more malleable and flexible federal rules. But the Federal Rules of Evidence are more rigid than the rules evolved at common law on the issues before us. Before the enactment of the Federal Rules, we permitted extrinsic evidence on rebuttal to prove the falsity of a witness' statement on direct. White v. United States, 317 F.2d 231 (9th Cir. 1963) and Ferrari v. United States, 244 F.2d 132, 140 (9th Cir. 1957), both citing Walder v. United States, 347 U.S. 62 (1954); Brady v. United States, 148 F.2d 394, 395 (9th Cir. 1945). In light of the express dictates of rule 608(b) this common law rule of evidence has no continued vitality in the federal courts.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 2 1977
EMIL E. MELFI, JR.
CLERK,
U.S.COURT OF APPEALS

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

WILLIAM COURTNEY BATTS,
Defendant-Appellant.

No. 76-2308

ORDER

Appeal from the United States District Court
for the Western District of Washington

Before: KENNEDY and ANDERSON, Circuit Judges, and VAN PELT,* District Judge.

The opinion published June 3, 1977, is amended by deleting the first full paragraph of the second column on page 1115 by substituting therefor the following:

> We must also note that the trial court was aided in applying the above-mentioned balancing test by the fact that the rebuttal evidence consisted of prior activity in drugs, albeit a different drug. The connecting factor between the crime charged here and the rebuttal evidence is the fact that the crime here charges an intent to distribute (hashish) and the rebuttal evidence discloses an act of distribution. Merely because the drugs involved are different does not strip this conduct of its evidentiary value. The past act of distribution of one drug is relevant to show knowledge, motive and intent on the part of appellant to partake in the attempt here to import commercial quantities of yet another drug for the purposes of distribution. Rule 404(b), Federal Rules of Evidence, further supports the trial court's ruling and the

balancing process, we think, is implicit in the Rules, by providing, inter alia, that such evidence is admissible to show motive, intent, knowledge, or absence of mistake or accident. See also United States v. Marshall, 526 F.2d 1349, 1360-61 (9th Cir.), cert. denied, 426 U.S. 923 (1976). The relevant factor is the type of activity undertaken, not the identity of drugs. United States v. Perez, supra; United States v. Rivera, 437 F.2d 879 (7th Cir. 1971). When such probative value is coupled with, as in the present case, a claimed lack of knowledge about drugs, the rule of evidence which could exclude such conduct should be carefully scrutinized and weighed in light of the ultimate purpose of ascertaining the truth. We believe the trial court properly exercised its discretion in not applying in isolation a rule of evidence which would destroy this goal.

Footnote 9, page 1116, is amended to read as follows:

We are mindful of the dissent's reference to United States v. Trejo, 501 F.2d 138 (9th Cir. 1974). We question the wisdom of the finding of error in that case, but note that, even though the trial court ruling was held to be error, it was not prejudicial error and the conviction was affirmed. It is the result of a rigid application of a single rule of evidence or prior case law and appears to overlook the importance of the truth-finding process. Moreover, we believe the rationale of our holding under the facts in this case is more appropriate to the circumstances and is more consistent with the aim and central purpose of the Federal Rules of Evidence. We also note that Trejo was decided before the effective adoption date of the Federal Rules of Evidence. Cases discussing the knowledge and intent theory prior to adoption of

the Federal Rules of Evidence, such as Trejo, are of lessened authority since the adoption of the Federal Rules of Evidence.

The dissenting opinion is amended as reflected in a separate order attached hereto.

Counsel are further notified that the petition for rehearing and suggestion for rehearing en banc are under consideration. No further filing by motion, petition or response is necessary pending further order of the court.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 76-2308
WILLIAM COURTNEY BATTS, Defendant-Appellant.	)	ORDER

Appeal from the United States District Court
for the Western District of Washington

Before: KENNEDY and ANDERSON, Circuit Judges, and VAN PELT,* District Judge.

The dissenting opinion is amended as follows:

The first two full paragraphs on page 1117 of the West slip opinion are deleted and are replaced by the following:

> The majority's treatment of United States v. Trejo is unconvincing. Fed. R. Evid. 404(b), which permits the introduction of evidence of prior bad acts to prove motive or knowledge in a proper case, is merely a statement of the rules controlling the admissibility of prior conduct for specific purposes. It has nothing whatever to do with whether or not illegally seized evidence is subject to the operation of the exclusionary rule. I fail to see how the Federal Rules of Evidence may take precedence over a rule of constitutional dimension. Furthermore, application of the Rules of Evidence would be far too complex if we were to use them as ad hoc justifications for altering settled principles of constitutional interpretation to which they do not directly pertain. Finally, if the Trejo case was wrongly decided, as the majority hints that it was, then the holding of that case can be

reversed only by our en banc reconsideration of the principles established therein.

The majority's second proffered rationale for admitting the rebuttal evidence, the claim that it constituted proper impeachment under Fed. R. Evid. 608(b), is contrary to the express terms of that rule. Rule 608(b) explicitly provides: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence." The rule codifies conventional practice which has evolved since the early eighteenth century. See 3A Wigmore, Evidence § 979 (Chadbourn rev. 1970); E. Morgan, Basic Problems of Evidence 73 (1962); Hale, Specific Acts and Related Matters as Affecting Credibility, 1 Hastings L.J. 89 (1950). Rule 608(b) has been applied unequivocally by this and other circuits.[2]

The paragraph beginning at the end of page 1119 and continuing on page 1120 is deleted and is replaced by the following:

Thus, even if the majority's interpretation of the interplay of rules 608(b) and 102 were correct, I still could not agree that we should distort the rule where the prosecution manifestly failed to use it properly. And, if the evidence were properly admissible under rule 404(b), as the majority contends, the necessity for creating this new exception to rule 608(b) vanishes completely. The court's opinion gratuitously sanctions questionable prosecutorial tactics that flaunt the rules and that create the serious possibility of "unfair prejudice, confusion of the issues, [and] misleading the jury . . . ." Fed. R. Evid. 403. See Notes of Advisory Committee on Proposed Rules, Fed. R. Evid. 608(b).

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
AUG 9 1977
EMIL E. MELFI, JR.
CLERK,
U.S.COURT OF APPEALS

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 76-2308
WILLIAM COURTNEY BATTS, Appellant.	)	ORDER

Appeal from the United States District Court for the Western District of Washington

Before: BROWNING, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, SNEED, KENNEDY, and ANDERSON, Circuit Judges.

Appellant filed its petition for rehearing with a suggestion for rehearing en banc, June 16, 1977. The panel circulated to the court proposed amendments to the opinions, together with its recommendation that an en banc vote be taken. Orders so amending the opinions were filed August 2, 1977. Upon the vote of a majority of the active judges of the court, and with the opinions so amended, it is ordered that the assignment of the cause heretofore made to Judges Kennedy, Anderson, and Van Pelt* is withdrawn and the appeal shall be considered by the court en banc. Oral argument will be at 1:30 p.m. on the 12th day of October, 1977.

The appellees may file a response to the petition for rehearing and either party may file

supplemental citation of authorities and memoranda of law on or before September 27, 1977.

FOR THE COURT:

James W. Browning
Chief Judge

*The Honorable Robert Van Pelt, United States District Judge for the District of Nebraska.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED
JAN 20 1978
EMIL E. MELFI, JR.
CLERK,
U.S.COURT OF APPEALS

UNITED STATES OF AMERICA, Appellee,	)	
v.	)	No. 76-2308
WILLIAM COURTNEY BATTS, Appellant.	)	ORDER

Appeal from the United States District Court for the Western District of Washington

Before: BROWNING, ELY, HUFSTEDLER, WRIGHT, TRASK, CHOY, GOODWIN, WALLACE, SNEED, KENNEDY, ANDERSON and HUG, Circuit Judges.

The above entitled case was argued and submitted to the court sitting en banc in San Francisco, California, October 12, 1977. The court has now determined that the case was inappropriate for en banc consideration, and, accordingly it is ordered that the case be returned to the panel before which it was originally heard (Kennedy and Anderson, Circuit Judges, and Van Pelt, District Judge*) for disposition upon petition for rehearing.

FOR THE COURT:

/s/ James W. Browning
Chief Judge

*The Honorable Robert Van Pelt, Senior United States District Judge for the District of Nebraska, sitting by designation.

APPENDIX B

1. CONSTITUTIONAL PROVISIONS

a. United States Constitution, Amendment IV

Searches and seizures

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

b. United States Constitution, Amendment V

Capital crimes; double jeopardy; self-incrimination; due process; just compensation for property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. STATUTES

a. 18 U.S.C. § 2

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

b. 21 U.S.C. § 841

Prohibited acts A-Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentially--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 845 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one

or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(B) in the case of a controlled substance in schedule I or II which is not a narcotic drug or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine of not more than $10,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine of not more than $20,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine of not more than $5,000, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine of not more than $10,000, or both.

(4) Notwithstanding paragraph (1) (B) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration

shall be treated as provided in subsections (a) and (b) of section 844 of this title.

Special parole term

(c) A special parole term imposed under this section or section 845 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. A special parole term provided for in this section or section 845 of this title shall be in addition to, and not in lieu of, any other parole provided for by law.

c. 21 U.S.C. § 952

Importation of controlled substances--Controlled substances in schedules I or II and narcotic drugs in schedules III, IV, or V; exceptions

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States) to to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV, or V of subchapter I of this chapter, except that--

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic

drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States--

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate, or

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 823 of this title,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

Nonnarcotic controlled substances in schedules III, IV or V

(b) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any nonnarcotic controlled substance in schedule III, IV, or V, unless such nonnarcotic controlled substance--

(1) is imported for medical, scientific, or other legitimate uses, and

(2) is imported pursuant to such notification or declaration requirements as the Attorney General may by regulation prescribe.

Coca leaves

(c) In addition to the amount of coca leaves authorized to be imported into the United States under subsection (a) of this

section, the Attorney General may permit the importation of additional amounts of coca leaves. All cocaine and ecgonine (and all salts, derivatives, and preparations from which cocaine or ecgonine may be synthesized or made) contained in such additional amounts of coca leaves imported under this subsection shall be destroyed under the supervision of an authorized representative of the Attorney General.

d. 21 U.S.C. § 960

Prohibited acts A--Unlawful acts

(a) Any person who--

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 955 of this title, knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 959 of this title, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b) of this section.

Penalties

(b) (1) In the case of a violation under subsection (a) of this section with respect to narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) of this section with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term of imprisonment, include (A) a special term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.

Special parole term

(c) A special parole term imposed under this section or section 962 of this title may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 962 of this title is in addition to, and not in lieu of, any other parole provided for by law.

3. RULES

a. Federal Rule of Evidence 404(b)

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

b. Federal Rule of Evidence 608 (b)

(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility.